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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1900.

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THE SUPREME LODGE KNIGHTS
OF PYTHIAS OF THE WORLD,
Plaintiff in Error,

vs.

LILLIAN R. BECK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. B. NOLAN,
Attorney for defendant in error.

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The errors complained of will be considered in the order in which they are presented in the brief of plaintiff in error.

I.

The record discloses that Mr. Beck was a periodical drinker, and that while under the influence of liquor he was abusive. In consequence of this abuse his wife threatened to leave him. It was only during those

periods of intoxication that family disturbances occured. One of these disturbances occurred about six weeks before his death, but a reconciliation was effected which continued without interruption until a drinking bout took place four days before his demise.

There is some evidence that during the period of three years, (1893–4–5) on two particular occasions, when the servant called his attention to the fact that he was drinking, he remarked in one instance that "a man that had as much trouble as he had the sooner the end came the better", and in the other instance that, "a man that had as much trouble as he had would be better off dead than living". These remarks were made in the early part of March 1895. If they indicated an intent to terminate his existence, surely opportunities innumerable must have presented themselves during the period of eighteen months, from March 1895 till October 1896. The record shows that during this time pistols and knives were within his reach, better fitted to accomplish self destruction than a gun. It is true that he stated that unless his wife lived with him he would kill her, and at Nolan's residence about an hour and a half before his death he stated that if she did not come out he would kill her. It will be noticed that the statements as to the killing are conditional, but even if unconditional they do not necessarily suggest suicide.

If Mr. Beck on the night of the 31st of October intended to kill his wife, or intended to commit suicide, why should he use a gun to do this, when a revolver would be far more serviceable, and the record shows that he was not without a revolver, and indeed if he were, no doubt one could be borrowed equally as well as a gun. If such were his intention for what earthly reason was his partner asked to accompany him? With

a gun in his possession concealment of intention was impossible. With Mr. Votaw along there was a strong probability that an attempt to commit murder would be frustrated. Besides it is not an *established fact* that on the evening of the thirty first Mr. Beck was intoxicated or excited. Mr. Votaw says that when he went to Nolan's house he seemed to be all right; he did not seem to be under the influence of liquor; he seemed to be perfectly rational; seemed to be a little troubled-worried. (36) Of course, he was. He was exceedingly attached to his wife. In his last drinking bout he had disregarded the promise that he had made to her, and was unduly anxious to effect a reconciliation, as he had theretofore done. Mr. Reece testifies (32) that he knew Frank Beck in his life time, and that he drank, but that on the night of the thirty first he did not think he was under the influence of liquor. It is true when he was refused admission into Nolan's residence he became angry, and tried to force an entrance, but we are not justified in supposing it was his purpose if he effected an entrance to kill his wife and himself, for as already stated Votaw was there to prevent this. Indeed, the record shows that at this time he was not in the possession of the gun at all.

It is asserted that a homicidal mania was exhibited in procuring the "Doughty" gun. Is it an established fact that the gun was procured for criminal purposes? The record shows that the Beck family had a propensity for hunting. *Not for human victims as plaintiff in error would readily conjecture.* Six weeks before the thirty first of October two guns were taken to Elliston for hunting purposes. Elliston was a place to which he was in the habit of going. There is no particular reason why we should not conclude that he had Elliston in view when he spoke about hunting in connection

with the Doughty gun. At any rate, *it is not an established fact that he had Mrs. Beck in mind when he used this language.* If this were so, and his intention was bonafide, I ask again, at the risk of repetition, why announce it from the house tops, and why use such a weapon as a gun?

There is no warrant for the statement that Beck was *violently passionate* immediately preceding the fatal act. He was violently passionate at the time that he attempted to force the door. This was in the neighborhood of seven o'clock. And we will admit that he was violently passionate when he broke the window, if he did so. This is largely conjectural. How much time elapsed after the latter act before the fatality occurred? You are invited to engage in guess work. The plaintiff in error could remove this question from the domain of speculation by proof upon the trial. For some purpose known to itself it declined or neglected to do so.

The nature of the wound, the impress of the gun barrel, the absence of powder burns, the position of the body and the testimony of Gordon are all consistent with the theory of the accidental discharge of the gun, and some of them are TOTALLY INCONSISTENT with the theory of suicide in the light of the evindence adduced upon the trial. There only remain of the established facts discussed in the appellant's brief the *fear of arrest and punishment* and the *universal opinion shared by Mrs. Beck and her attorney that death was due to suicide.* As to these, suffice it to say that the institution of a suit controverts the latter, for we must indulge in the presumption in the absence of proof that recourse to perjury would not be indulged in to make recovery possible. Besides, if such a belief were entertained by Mrs. Beck or her attorney, it is apparent

that it rested exclusively on rumor and supposition. As to the fear of arrest and punishment if this motive actuated suicide, why was it necessary to leave the water closet to discharge the gun?

But why prosecute this inquiry further. It is profitless to indulge in speculation. Beyond the record in this case there is no need to go, and from this record no other verdict could be rendered than that which was rendered. Whatever may have been the motive that impelled Mr. Beck to demean himself as he did on the night of the thirty first of October, it is absolutely certain that his life was extinguished by the accidental discharge of the gun. *And, first as to the gun itself.* The gun used upon the trial was undoubtedly the gun used by Mr. Beck. Why? Where did this gun used upon the trial come from? The record shows that it came from plaintiff in error (26). It was used to illustrate how the killing was effected, and how the mark found upon the body was inflicted. By general consent it was conceded to be the gun with which the killing was done. If this were not the gun why should Lindner be permitted to examine it to testify whether or not by concussion or shock it could be discharged? Instead of a request to experiment in court with the gun the suggestion would be made that this was not the gun with which the killing was done. Surely the plaintiff in error knew where the gun came from, and its silence in this regard is conclusive as to the identity of the gun. It is true that objection was made when Oscar Beck used the gun to show that it could not be discharged without the aid of some foreign object, *because it was not shown that it was the gun with which the killing was done.* Surely objection of this kind coming at the time when it did was trifling with the court. The gun was brought in to court by the

plaintiff in error, and was used up to that time apparently as if it were the gun that was used with fatal effect on the night of the thirty first. If this weren't the gun, it was a duty incumbent upon the learned counsel for plaintiff in error to so state after introducing the gun into the case. He could have told or shown where it was obtained so as to eliminate from the case every element of doubt on this point. There was a studied attempt to create confusion in the minds of the jurors when the theory of sucide was exploded through the testimony of Doughty (31) and Hilda Berg (33) about long guns and short guns. Instead of this why was there not evidence directed to the gun used upon the trial as to where it came from? The statutes of Montana tersely express a principle of evidence of universal application.

"That evidence wilfully supressed would be adverse if produced".

"That higher evidence would be adverse from inferor being produced".

Code of Civil Proc., Mont. Sec. 3266, Sub-divisions 4 and 5.

In this case then it must be considered as an established fact that the gun used upon the trial was the gun with which the killing was done.

Mr. Flaherty, the undertaker (26) testified as follows: "I noticed that there was a mark under the left eye * * * the skull was blown from the scalp, there were no powder marks upon the face * * * in my opinion the death of Frank E. Beck was caused from a gun shot wound; in my opinion judging from the marks upon the body of Mr. Beck and the absence of powder marks the gun was pressed against the body at the time it was discharged; the cause of the circular mark

which I have mentioned upon the face of Mr. Beck in my opinion was the impression of a gun barrel * * * (gun is produced by attorney for defendant and witness requested to illustrate to the jury how the mark could have been made). If you had a gun set on the ground with a man holding his face on the barrel thus (witness illustrates) it would leave a mark as I have described * * * The stock of the gun was placed upon the ground and Mr. Beck pressed forward pressing his eye against the barrel of the gun making the mark I have already referred to and stooping down and discharging the gun".

We have here the theory of suicide, and the only theory that was advanded by the plaintiff in error as to the manner of Beck's death.

Upon Cross-Examination (27) the witness testified as follows * * * "My theory is that it was pressed against the face when it was discharged (the gun).

Q.—Are you prepared to say that this mark was not occasioned by the pressure of the skin upon this bone?

A.—I am prepared to say that the mark was caused by the pressure upon the skin of a barrel of a gun * *. My theory is that the gun was put on the ground like that—just like that (witness indicating by placing the stock of the gun on the floor and pressed against his left eye) and then the trigger was touched and the gun went off * * *. My arm isn't long enough but I could do it with that pencil.

Q.—And if you were there it would be necessary for you to use a pencil or stick of wood or something to get the gun off?

A.—Yes, Sir. I don't know how my arms compare with Mr. Beck's arms. If his arms were the same lenghth as mine it would be necessary for him to send the gun off with a pencil or stick of wood * * *.

The witness was recalled after the defendant had rested, and testified as follows (28): "I do not pretend to say that the mark could not be occassioned in any other way than placing his head upon it. It would require some little time to get the gun down in the manner I give you to understand it was placed this morning; It would take some little time for him to get his face in shape and to get the gun down and a pencil or stick to get the gun off if his arm wouldn't reach. And if the evidence showed in this case that the man having the gun stepped from a water closet on to a walk and the gun was accidentally discharged by coming into contact with the walk it of course is *possible that the death of Beck might have occurred by his falling on the gun if the gun was discharged simultaneously with his head striking the barrel*, and under the circumstances that might occassion the mark there. I gave you to understand that the gun was resting against the eye this morning. I gave you my theory but stepping down and falling upon the gun would make a mark like that * * *."

If this were a suicide with the mark existing as it did considerable time would be consumed in adjusting the gun and the gun could only be discharged by stooping so as to reach the trigger. The theory was a good one were it not for the difficulty experienced in discharging the gun. To make the theory tenable it was necessary that a pencil or stick of wood should be used. But nobody pretended to testify that these aids were called into requisition. *The proof conclusively shows that the killing did not take place in this way.* The rapidity with which the discharge of the gun followed the exit from the water closet left available no time for fixing and discharging the gun as testified by Mr. Flaherty.

Grant Gordan testifid as follows: (37 and 38) * * * It was so dark that you could not see for a greater distance than fifteen or twenty feet * * * I saw him walking towards the closet and saw him step into the closet * * * after he walked around the closet he stood there perfectly still then he seemed to step out of the water closet * * * and the gun was then discharged * * *. I say that in my judgment he went into the water closet judging from the sound of his footsteps * * * then there was a sound indicating that he left the water closet and immediately after hearing these sounds of moving the gun was discharged * * * just as he stepped out the gun was discharged * * *."

From this testimony there is no time furnished for getting the gun upon the ground and pressing the left eye upon the barrel. There is no time available to hunt a pencil or stick to facilitate the discharge of the gun. If suicide were intended there was no need to leave the closet. *Is it not more likely that the closet was entered for the purpose of concealment and the presence of the officers in the neighborhood of the closet made it desirable to secure some other place of concealment in the darkness?* Which is the more likely, under the circumstances, the accidental discharge of the gun or the intentional discharge of it? The night was exceedingly dark. There was a step leading from the closet to a plank walk. The gun held in the hand might be used to steady the body or prevent it from falling, if a step were taken from the closet to the walk inadvertently. It is possible that the eye might come in contact with the barrel if the gun were used in this way so as to cause the mark under the eye, and if a discharge of the gun followed from concussion the body would be in identically the same situation as if

the gun were intentionally discharged, in conformity with the theory of the defense. In the case of an intentional discharge the body would not be in a more recumbent position then if an accidental discharge took place. The experiments conducted before the jury showed this, and the testimony of Mr. Flaherty (28) leaves no room to doubt but that death was the result of the accidental discharge of the gun.

The burden of proving suicide rested with the plaintiff in error. The proof adduced precluded the possibility of the suicide theory and establishes beyond a reasonable doubt that death was due to accidental causes.

If there is any evidence to sustain the verdict this Court will not inquire as to its sufficiency. It is only where there is no evidence that an appelate tribunal will interfere.

Hyde and Oglesby vs. Stone, 20 How., 170.

Lancaster vs. Collins, 115 U. S., 222.

Chicago and N. W. R. R. Co. vs. Ohle, 117 U. S., 123.

Loewer vs. Harris' administratrix, 14 U. S. App., 615.

Insurance Co. vs. Johnson, 37 U. S. App., 413.

II.

The ruling of the court in excluding an offer of proof while Mr. Doughty was testifying is complained of.

This witness was resorted to to mystify the jury concerning guns. It was undoubtedly competent to show that a gun was obtained by Mr. Beck, and if the witness were competent to do so, to describe with par-

ticularity the gun borrowed. Whether the Doughty guns were short or long was immaterial except in so far as the evidence might show if the killing was done with the borrowed gun that such gun was a shorter gun than the one with which the experiments were made, and in the offer of proof there was no pretense that a comparison of guns with this object in view was intended. The evidence in the record shows unqualifiedly that the Doughty gun was not used by Beck on the night of the thirty first. The testimony of Hilda Berg (33) is obscure upon this point. The testimony shows that the gun with which the killing was done was turned over to the coroner, from whom no doubt counsel for plaintiff in error obtained it.

Oscar Beck testified on this point (38) as follows:

"I know of a gun that was taken from Mr. Doughty's a short time before my brother died. I first became aware of it in my brother's house after his death. I think I found the gun in the dining room of my brother's house after his death. I returned it to Mr. Doughty to the store there to a man in charge of the store, and Mr. Doughty was there at the time; this was shortly after my brother's death—I don't know how long. It was not the Doughty gun that terminated the life of my brother".

If this is true, and there is no evidence to contradict it in the record, then how could the exclusion of any evidence regarding the guns that Doughty had in stock be of any materiality? The learned counsel in his brief, discussing this feature of the case says: "That a gun of unusual length was introduced into the court room and it was never proved that this was the gun with which Beck killed himself." Introduced by whom? Why sir, where did you get this gun of unusual length? And if it were not the gun with which the

killing was done surely you were in a position to show this. Such argumentation in the light of the facts before us borders on frivolity.

Doughty testifies that he was not present when the gun was borrowed. Why was not the person secured from whom it was borrowed? Doughty was present when the gun was returned. Now mark the line of inquiry in the face of this proof (31).

Q.—"What character of guns did you carry in stock there?"

"I object to the question for the reason that it is incompetent, irrelevant and immaterial what kind of guns he kept".

By Mr. Loeb.—"I desire to offer to show by this witness that he had in his possession several lengths of guns and some are what is called the Belgian gun. Some are long barreled guns and some are short barreled guns, and so far as the recollection of this witness is concerned he does not know whether it was a long or short barreled gun that was *borrowed* by Mr. Beck."

It must have been apparent to the court that there was no frankness in this offer. It is true that witness had no recollection as to whether it was a long or short barreled gun that was borrowed. It could not be otherwise, as he was not present when the loan was made. He was present when the gun was returned and no doubt had a recollection as to that gun. Yet no question was asked as to what the length of the gun that was returned was or how it compared in dimensions with the gun in the court room.

III.

Mr. Lindner testified (39 and 40) as an expert in the handling and discharging of fire arms and after examining the spring of the trigger he expressed the opinion that if the trigger were raised the gun could be discharged by a sudden shock. Upon cross-examination the witness was invited to make a test before the jury. This was disallowed upon objection being made, and this ruling is claimed to be erroneous.

In the first place such a request was not warranted as within the scope of a proper cross-examination.

Code of Civil Procedure, Montana, Sec. 3373.

The judgment of the witness was based upon the tension of the spring. Without any testimony at all upon the point it is a matter within the judicial knowledge of the court that a gun can be discharged by a shock, unless locked, and in this instance there is no pretense that such was the case.

Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.

Summerton vs. Columbian Insurance Co., 37 N. Y., 174.

A court will notice judicially anything in the common knowledge and use of the people throughout the country, as things that must happen according to the laws of nature.

Brown vs. Piper, 91 U. S., 42.

Experiments in the presence of a jury are generally discountenanced.

Thompson on Trials, Sec. 620.

The matter of the allowance or disallowance of experiments is largly within the discretion of the court.

Ball vs. U. S., 163 U. S., 662.
U. S. vs. Reed, 42 Fed., 134.
People vs. Levine, 85 Cal., 39.
Homan vs. Franklin Co., 98 Ia., 692.
Ord vs. Nash, 50 Neb., 335.
Leonard vs. Southern Pac., 21 Oregon, 555.
Heath vs. State, 91 Ga., 126.

The test invariably is will the evidence tend to enlighten the jury and enable them the more intelligently to consider the issues presented.

Burg vs. Chicago etc. R. Co., 90 Ia., 106.
Boyd vs. State, 14 Lea., 161.

There where no limitations as to the test that was to be applied. The witness was asked in a general way to subject the gun to a shock. If the surroundings were the same as on the night of the thirty first of October some good might result from the experiment.

Experiments to be admissible must be based on conditions similar to those existing in the case on trial.

Eidt vs. Cutter, 127 Mass., 522.
Leonard vs. Southern Pac. Co., supra.

Where an experiment is offered to prove a fact or theory already established by the testimony, the allowance or disallowance of such experiment is not error of which either party can complain.

Am. and E. E. of Law, Vol. 12 (2nd edition), 401.
Osborne vs. Detroit, 32 Fed., 36.

If the judgment of the witness as to the possibility of the discharge of the gun was erroneous this fact could be established in the regular, legitimate manner by *expert testimony as to a different state of facts.*

The ruling of the Court was strictly correct, and under no conceivable combination of circumstances could the failure to permit this experiment prove prejudicial to the defendant.

IV.

Error is suggested on account of permitting Oscar Beck to try to reach the trigger of the gun, after placing himself in relation to the gun in the situation which Flaherty said it was necessary that he should be placed to cause an intentional discharge of it (38).

This was done after witness had testified that he had longer arms than his brother. Objection was made because the identity of the gun was not established. This feature has been so extensively discussed heretofore that further comment is avoided.

Assuming for the sake of argument that it was not the gun its use under the circumstances was justified on account of its use in the same manner by Mr. Flaherty.

As already noticed, the gun was undoubtedly Beck's, and its use in the manner indicated was authorized.

V.

This alleged error is on a par with its predecessors. Proofs of death were presented, signed by the plaintiff in which the acknowledgement was made that death was due to suicide. She was subjected to a searching cross-examination and exhibited commendable frankness in stating that she did not know whether it was a case

of suicide or accidental death. The following question was then put, the disallowance of which is made the basis of error.

Q.—Is it not a fact Mrs. Beck that you have stated to a great number of persons in speaking about this case that there was no question but what Mr. Beck committed suicide but that the company could not prove it?

If any benefit could possibly be derived from the proof of such a fact the fact was established by the proofs of death.

Besides the allowance of such a question was in direct violation of section 3380 of the Code of Civil Procedure of Montana, which provides:

"A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony, but before this can be done the statements must be related to him, with the circumstances of time, places and persons present, and he must be asked whether he made such statements, and if so allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them."

Testing this question by the positive requirements of law it is signally lacking in essentials, and its exclusion was correctly ordered.

Complaint is made that the learned Circuit Court of Appeals did not specifically consider the rulings of the trial court on the admission and exclusion of evidence. Considerable space in the brief of the plaintiff in error is devoted to their consideration. We respectively submit that the principles of law that have application are elementary, and the claims of the learned counsel for plaintiff in error in reference thereto are without foundation in reason or authority.

VI.

The sixth assignment of error involves a consideration and discussion of the law as to the burden of proof and the effect of admissions such as here confront us affecting the burden of proof.

The authorities without exception hold that the burden is upon the company.

Niblack Benefit Societies and Accident Insurance, Sec. 326.

Lanysken vs. Traveler's Insurance Co., 52 Pac. 1040.

Carnes vs. Iowa State etc. Association, 106 Iowa 281.

Standard Life and Accident Insurance Co., 100 Fed., 582.

Preliminary proofs are admissible as prima facie evidence of the facts stated.

Insurance Co. vs. Newton, 22 Wall, 32.

Bachmeyer vs. Mutual Reserve Fund Life Association, 82 Wis., 255.

Goldsmith vs. Mutual Life Insurance Co., 102 N. Y., 486.

Home Benefit Association vs. Sargent, 142 U. S., 691.

Sharland vs. Washington Life Insurance Co., 101 Fed., 206.

Hannah vs. Conn. Mutual Life Insurance Co., 150 N. Y., 526.

As shown by the instructions asked for, set forth in the assignment of errors, the defendant's theory was

that on account of the admission in the proofs of death the burden of proof shifted; this position is now conceded to be erroneous.

Under the authorities herein set forth and in conformity with the principles of law now conceded to be correct the law was enunciated by the learned trial judge. Instance the following:

"The defendant has offered in evidence the proofs of death of Frank E. Beck and has also offered in evidence the testimony of the witnesses at the coroner's inquest and the verdict of the coroner's jury. This evidence under the law it is proper for you to consider, but you are instructed that it is not conclusive upon the plaintiff, nor is the plaintiff estopped from showing a condition different from that suggested by such proofs of death or verdict."

"You are instructed that in considering this evidence you must do so in the light of the explanations made by the plaintiff and in this connection you are at liberty —nay more, it is your duty, to consider whether or not the conclusion set forth is warranted by the evidence upon which such conclusion is based, for after all it is for you to say whether or not upon the evidence plaintiff was justified in saying that the death was intentional rather than accidental, and so likewise is it your duty to say whether the coroner's jury on the evidence before it could consistently find that the death was suicidal rather than accidental. In considering this feature of the case it is not only your duty to consider the verdict of the coroner's jury, but also to consider the evidence which was adduced before that coroner's jury. So likewise it is your duty not merely to consider the proofs of death furnished to the company, but it is your duty to consider the circumstances surrounding the presentation of such proofs and the evidence which the plaintiff had respecting the question as to whether the death of Frank E. Beck was accidental or intentional at the time she signed those proofs of death, and in this connection it is proper for you to consider as to where she was at the time the gun was discharged

and whether she could see her husband at that particular time, and if upon the whole evidence with explanations offered as to how those proofs came to be submitted and considering all the evidence in the case now before you you are not satisfied by a preponderance of the evidence that Frank E. Beck did kill himself intentionally then I tell you that under those circumstances the plaintiff is entitled to a verdict and your verdict should be so declared."

"The declaration of the plaintiff in her statement as to the cause of the death of her husband Frank E. Beck has been admitted in evidence in this case. This admission or declaration was to the effect that said Beck had committed suicide while insane. If this admission was not overcome or counter-balanced by other evidence in the cause this admission would warrant you in finding that the deceased Beck came to his death as in the statement set forth * * * ".

"It has been stated here in the argument and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occassioned by suicide that then the burden of proof is shifted and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission and showed that it was not correct, that it was wrong, why then it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to Insurance Companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject that admission may be disregarded and should be disregarded. A man is only estopped from denying his admissions and declarations when it would work a fraud upon the other party and there is no claim in this case—no claim that it would work a fraud upon the defendant in this respect."

(Assignments of error 17, 18, 21 and 30.)

These instructions although excepted to are seemingly now not considered objectionable, as they are not referred to in brief of plaintiff in error. They constitute a correct expression of the the law and the jury having been advised in this manner it was not error to refuse the instructions asked by plaintiff in errror which announced doctrines at variance with those contained in the instructions supra.

The instruction refused constitute assignments of error 12 and 13 and are as follows:

"Gentlemen of the jury you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian R. Beck, the plaintiff herein under the policy or certificate upon which this suit is brought. it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner of the death of Frank E. Beck are overcome by proof adduced by her showing that her husband came to his death by accident or some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of the said Frank E. Beck and you will find that he committed suicide in accordance therewith and your verdict must be for the defendant."

"The jury are instructed that as a matter of law governing cases of this character it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made

under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by the representation of suicide makes the case one where she must show that her husband did not purposely kill himself."

These instructions are misleading and incorrectly state the law. Under the law as it is conceded to be, it is only necessary to obviate the effect of the admissions in the proofs of death. The burden of proof permanently remains with the defendant. The representations in the proofs of death did not operate as an estoppel. Under the instructions asked for the burden of proof is thrown upon the plaintiff to show that the statements in the proof were made by *mistake or under a misapprehension of the facts. If this was accomplished no recovery could be had although the proof might unqualifiedly show that the death was result of accident.* Supposing Mrs. Beck on the stand testified that at the time she presented the proofs of death she knew that the statement which the proofs contained that her husband was a suicide was false and the proof unconditionally showed that death was the result of accident, under the law she would recover; under these instructions she could not. These instructions were framed under the theory that the representation made in the proofs of death operated as an estoppel, which could only be removed by showing that it was made through fraud, accident or mistake. It was only necessary to destroy the probative force of this admission to entitle her to recover, and this might be done by evidence entirely disconnected with the execution of the proofs of death or the representations therein contained. Requirements were demanded by these instructions which the law did not authorize, and the instructions were correctly refused.

The plaintiff in error in its answer neglected to interpose as a defense the admission of suicide in the proofs of death. This failure to plead such an admission did not affect its admissibility upon the trial. It was an item of evidence to be considered with other items to sustain the theory of the defense. If however upon consideration of the entire evidence the suicide theory was not established the plaintiff was entitled to a verdict. By the overwhelming weight of authority this is the law, and the instructions requested are at variance with it.

VII.

The seventh assignment of errors as noted in brief refers to the giving of the following instruction (Record page 80.)

"There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he did not do it intentionally."

This instruction is objectionable from the standpoint of plaintiff in errror for the reason that the proof before the jury unqualifiedly showed suicide, and the jury should be so instructed. The learned court differed with the plaintiff in error on this point, and a calm, dispassionate consideration of the evidence in the record irresistibly leads to the conlusion that the court was correct in the views entertained. The instruction is a correct exposition of the law as announced in the cases cited.

VIII.

This brings us to the consideration of the last assignment of error, the refusal of the court to give the following instruction: "Here is an instruction asked which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he can not recover under the by-laws. As I understand that by-law it must be a case where a man is in the act of violating the law. For instance if a man in breaking into a house is killed in the act, he can not recover. But if a man contemplating that he is going to kill his wife if she did not go home with him, but was not in the act and doing that at the time he was killed that clause of the policy does not apply."

To urge now, or at any other time, that the defense embraced in the "violation or attempted violation of any criminal law" was or is interposed in this action is a work of futility. We will go further and assert that until the instruction under consideration was presented to the trial court plaintiff in error never harbored the idea of interposing this defense. Why? Under the policy if death resulted from any of the excepted causes the policy was void. It was also provided that if death resulted from any of the excepted causes, a sum should be paid, which should bear such a proportion to the whole amount as the matured life expectancy should bear to the entire expectancy at the date of admission into the endowment rank. Under these provisions, assuming that death resulted from any of the excepted causes, the beneficiary would be entitled to one hundred and thirty eight dollars. The allegation in the answer is that Beck committed suicide and that his death resulted from voluntary self-destruction

whereby there accrued to the said beneficiary the sum of one hundred and thirty eight dollars which was tendered and refused. There is no suggestion that in consequence of death due to a violation or attempted violation of the criminal laws this amount was due to the beneficiary and tendered to her.

Section 690 of the Code of Civil Procedure of Montana provides as follows:

The answer of the defendant must contain:

1—"A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specially denied or admitted in the answer.

2—A statement of any new matter constituting a defense or counter claim."

Section 699, Code of Civil Procedure of Montana:

"A defendant may set forth in his answer as many defenses or counter claims or both as he has, whether they are such as were formerly denominated legal or equitable. *Each defense or counter claim must be seperately stated and numbered.* Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer."

If the violation or attempted violation of the law was intended as a defense it would no doubt be pleaded in conformity with the provisions cited. Most likely entertaining the view that the allegations in the proofs of death admitting suicide constituted practically an estoppel absolute reliance was placed upon that ground.

There is no waver of a defense that an answer does not state facts sufficient to constitute a defense, and

this defect may be urged in the appellate court for the first time.

Territory vs. Virginia Road Co., 2nd Mont., 100.

Gillette vs. Hibbard, 3 Mont., 419.

Largey vs. Sedman, 3 Mont., 476.

Foster vs. Wilson, 5 Mont., 57.

Milligan vs. Savery, 6 Mont., 131.

Quirk vs. Clark, 7 Mont., 233.

Whiteside vs. Lebcher, 7 Mont. 478.

Raymond vs. Wimsette, 12 Mont., 557.

Let us more critically examine the allegation. It is as follows: (7) "That prior to said Beck taking his own life said Beck was attempting and did violate a criminal law of the State of Montana."

Supposing he was or did. That is no defense. To be effective as a defense death must have been caused or superinduced by or through the violation or attempted violation of a criminal law. It is a settled rule of practice that a pleading should be construed most strongly against the pleader.

Boley vs. Griswold, 2 Mont., 450.

If this were intended as a defense the law that he violated or attempted to violate would undoubtedly be set forth. As it appears, it is merely a legal conclusion. If this were intended as a separate defense surely at some stage of the trial the application to amend would be interposed, and the jury and the court and the opposing party would be apprised as to what particular law had been violated rather than be invited to a consideration of the entire criminal code of the State of Montana as outlined in the brief of plaintiff in

error, pages 51, 52 and 53. It is insisted that a waver has occurred by reason of failure to interpose a motion or demurrer. As already seen a waver of a defect such as here presents itself could not take place. A fair and reasonable construction of the pleading connects this allegation with the defense of suicide. It was not improper to allege it in connection with that defense. The fact that he violated or attempted to violate the law would be pertinent to consider as to the likelihood as to whether the death was the result of suicide. It is only proper then to consider this allegation as attempting to sustain the theory of suicide and undoubtedly for that and for no other purpose does it appear in the pleading.

Assuming that such a defense could be considered was there evidence to warrant its consideration by the jury.

Death must clearly appear to have been the natural and legitimate consequence of the violation of the law.

Bradley vs. Mutual Benefit L. Ins. Co., 45 N. Y., 422.

Griffin vs. Western Mutual Benefit Association, 20 Neb., 620.

The act in violation of law and the act causing death must be part of the same continuous transaction.

Cooke on Life Ins., Sec. 48.

The wrongful act must be the proximate cause of death.

Bacon Ben. Soc. and L. Ins., Sec. 339.

Goetzman vs. Conn. Mut. L. Ins. Co., 3 Hun., 515.

Harper vs. Phoenix Ins. Co., 19 N. W., 506.

Overton vs. St. Louis Mut. L. Ins. Co., 39 Mo., 122.

There must be some causative connection between the act which constitutes the violation of law and the death of the insured.

Jones vs. Accident Association, 92 Iowa, 652.

Whatever construction may be put upon the conduct of the decedent early in the evening it is too palpable that when he met his death there was no criminal law of the state that he was violating. We strenously insist however that the consideration of this feature of the case is unwarranted under the pleadings.

The judgment appealed from should be affirmed.

C. B. NOLAN,

Attorney for defendant in error.